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## Notes

### State Buy-American Laws—Invalidity of State Attempts to Favor American Producers

#### I. INTRODUCTION

In the 1970s the United States suffered a major reversal of its role in international economics. Chronic trade deficits, a battered dollar, cartelization of oil production, and persistent domestic unemployment and inflation created a perception that American economic strength was withering. That perception included a notion that a large part of the nation's economic troubles stemmed from import competition. At least partially influenced by that notion,<sup>1</sup> most states have acted to prefer American producers over foreign competitors in bids for state and local government procurement contracts.<sup>2</sup> Access to a strikingly lucrative market is at stake; current Department of Commerce estimates place the value of the annual state and local procurement market at \$133 billion.<sup>3</sup>

The means by which states have sought to accomplish this favoritism is not new. At the federal level, the Buy-American Act has given preference to American producers in federal procurements since 1933,<sup>4</sup> while at the state level, two major decisions prior to 1977 ruled similar state legislation unconstitutional.<sup>5</sup> More recently, the United States Congress approved a Government Procurement Code as part of a multilateral trade agreement,<sup>6</sup> signed in Geneva, culminating fifteen years of in-

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1. See Glen, *Buy American Laws Clash With New Trade Code*, NAT'L J., Jan. 13, 1979, at 60; Samuelson, *A More Sophisticated Kind of Protectionism*, Washington Post, June 27, 1978, § E, at 1, col. 5.

2. See note 22 *infra* and accompanying text.

3. U.S. DEP'T OF COMMERCE, 59 SURVEY OF CURRENT BUSINESS No. 7, at 41 (1979) (1978 figures from Table 3.7).

4. See Act of Mar. 3, 1933, ch. 212, §§ 1-3, 47 Stat. 1520 (current version at 41 U.S.C. §§ 10a-10d (1976)). A precursor to the Buy-American Act gave preference to American producers in 1875. Act of Mar. 3, 1875, ch. 133, § 2, 18 Stat. 455.

5. See *Bethlehem Steel Corp. v. Board of Comm'rs*, 276 Cal. App. 2d 221, 225-29, 80 Cal. Rptr. 800, 805-06 (1969); *Baldwin-Lima-Hamilton Corp. v. Superior Ct.*, 208 Cal. App. 2d 803, 818-20, 25 Cal. Rptr. 798, 809 (1962).

6. Agreement on Government Procurement, April 23, 1979, reprinted in MULTI-LATERAL TRADE NEGOTIATIONS: INTERNATIONAL CODES AGREED TO IN GENEVA, SWITZERLAND (Joint Comm. Print 1979) [hereinafter cited as GOVERNMENT PROCUREMENT CODE].

ternational negotiations.<sup>7</sup> The Code was implemented through the Trade Agreements Act of 1979,<sup>8</sup> and although it reduces the impact of the federal Buy American Act,<sup>9</sup> it does not cover procurements by state and local governments, even those financed by federal money.<sup>10</sup> The Code's failure to restrict state buy-Americanism, coupled with a recent New Jersey decision upholding that state's scheme,<sup>11</sup> has created a general impression that such state preferences are valid; five additional states have passed new buy-American legislation in the past two years,<sup>12</sup> and no legal challenges have been reported since the New Jersey decision.

This Note analyzes the validity of state buy-Americanism under the General Agreement on Tariffs and Trade (GATT),<sup>13</sup> the commerce clause,<sup>14</sup> and the federal foreign affairs power,<sup>15</sup>

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7. See S. REP. NO. 249, 96th Cong., 1st Sess. 2 (1979) [hereinafter cited as S. REP. NO. 249], reprinted in [1979] 6A U.S. CODE CONG. & AD. NEWS 3, 9-14. For a summary of the background of the Code and the trade package of which it is a part, see S. REP. NO. 249, *supra*, at 1-6.

8. Pub. L. No. 96-39, 93 Stat. 144 (1979) (to be codified in scattered sections of 19 U.S.C.). The Code itself is not self-executing, but required implementing legislation—Title III of the Trade Agreements Act of 1979—to become effective. Therefore, the text of the Act, not the Code, is United States law. See GOVERNMENT PROCUREMENT CODE, *supra* note 6, Part IX, 4(a), at 156; S. REP. NO. 249, *supra* note 7, at 36. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-4, at 167-68 (1978).

9. See 19 U.S.C.A. §§ 2511-2518 (West Supp. 1979). Specifically, the Trade Agreements Act authorizes the President to waive application of American preferences in federal procurements for nations meeting certain conditions. The most notable of these conditions is that the foreign nation reciprocate by allowing American producers to compete freely for its government contracts. *Id.* § 2511(b)(1)(B). See S. REP. NO. 249, *supra* note 7, at 133-35.

10. See S. REP. NO. 249, *supra* note 7, at 132. State and local governments are not among the covered governmental entities listed in the Code itself. See GOVERNMENT PROCUREMENT CODE, *supra* note 6, Annex I, at 221.

11. K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 289-93, 381 A.2d 774, 782-89 (1977), *appeal dismissed*, 435 U.S. 982 (1978).

Another court reached the same result, but its analysis does not warrant extensive comment here. In *American Inst. for Imported Steel, Inc. v. Erie County*, 58 Misc. 2d 1059, 297 N.Y.S.2d 602 (1969), a New York court rejected a commerce clause attack but relied on virtually no commerce clause case law. Instead, the court based most of its analysis on an analogy to a 1915 decision under the due process clause of the fourteenth amendment, *People v. Crane*, 214 N.Y. 154, 108 N.E. 427, *aff'd sub nom. Crane v. New York*, 239 U.S. 195 (1915) (upholding a New York statute that prohibited the employment of aliens by public works contractors). The court also disregarded the GATT issue with virtually no discussion. This Note, therefore, discusses the decision no further.

12. See note 20 *infra* and accompanying text.

13. See notes 24-67 *infra* and accompanying text.

14. See notes 68-116 *infra* and accompanying text.

15. See notes 117-152 and accompanying text. In some states, buy-American requirements may also be in conflict with statutory or constitutional re-

and concludes that each theory—particularly the latter two—provides an independent ground for invalidating state buy-American legislation. The Note focuses on the New Jersey decision because it is now the central authority for the validity of such state legislation. The issue of whether buy-Americanism is wise economic policy is not discussed;<sup>16</sup> only the legal issues are considered.

There are several types of buy-American provisions. One type may be termed an "absolute" form of buy-Americanism. Such a restriction essentially bans any government procurement of foreign-produced goods. A California statute that had this effect was ruled unconstitutional in 1969;<sup>17</sup> currently, only South Dakota appears to maintain an absolute form.<sup>18</sup> A more common form may be termed "limited" buy-Americanism. The New Jersey statute exemplifies this form, giving preference to American products only when practical and when the cost of the American product is not unreasonably higher than the foreign product.<sup>19</sup> Indiana, Minnesota, Ohio, Pennsylvania, and West Virginia all have statutes providing for limited buy-American preferences.<sup>20</sup> Some of the restrictions are limited to one product only. The Pennsylvania statute, for instance, applies only to procurements of steel.<sup>21</sup>

Because buy-Americanism may be accomplished by statute, administrative rule, or simply by the inclusion of specific requirements in individual state contracts, an exact catalogue of state restrictions cannot be supplied. It appears, however, that at least thirty-five states now formally and openly favor American goods in one way or another.<sup>22</sup>

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quirements for competitive bidding. See *Texas Highway Comm'n v. Texas Ass'n of Steel Importers, Inc.*, 372 S.W.2d 525, 529-30 (Tex. 1963). This issue, however, is simply a matter of resolving conflicting state law and is peculiar to each individual state. The issue is therefore beyond the scope of this Note.

16. For discussion of the economic issues, see Knapp, *The Buy American Act: A Review and Assessment*, 61 COLUM. L. REV. 430 (1961); Note, *State "Buy American" Policies—One Vice, Many Voices*, 32 GEO. WASH. L. REV. 584 (1964); sources cited in note 1 *supra*.

17. See *Bethlehem Steel Corp. v. Board of Comm'rs*, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969) (holding CAL. GOV'T CODE §§ 4300-4305 (West 1966) unconstitutional).

18. S.D. COMP. LAWS ANN. § 5-19-1 (1974 & Supp. 1979).

19. N.J. STAT. ANN. §§ 52:33-2, -3, (West 1955).

20. See IND. CODE ANN. § 5-16-8 (Burns Supp. 1979); MINN. STAT. § 16.073 (1978); OHIO REV. CODE ANN. § 153.011 (Page 1978); PA. STAT. ANN. tit. 73, §§ 1881-1887 (Purdon Supp. 1979); W. VA. CODE § 5-19-2 (1979).

21. PA. STAT. ANN. tit. 73, § 1881 (Purdon Supp. 1979). See IND. CODE ANN. § 5-16-8 (Burns Supp. 1979); OHIO REV. CODE ANN. § 153.011 (Page 1978).

22. See P. Andrews, *Status of State Laws, Regulations and Specifications Applicable to or Restrictive of Non-Domestic Materials 1-2* (interoffice memo-

It should be noted that the validity of preferences for products produced within the state over those produced in other states is distinct from the issue of the validity of buy-American preferences. Such "buy-in-state" preferences have been separately addressed by the courts and are discussed only collaterally in this Note.<sup>23</sup>

## II. THE GATT

The General Agreement on Tariff and Trade (GATT)<sup>24</sup> is a multilateral international agreement signed by the United States in 1947. The agreement now forms the central framework for trade relations among its eighty-four signatory nations.<sup>25</sup> Despite some early controversy regarding the effect of the GATT on inconsistent state law,<sup>26</sup> it is now clear that the GATT, like any valid treaty or executive agreement, is the "supreme law of the land."<sup>27</sup>

Article III of the Agreement (the "national treatment" re-

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randum, Chief Counsel's Office, Federal Highway Administration) (Aug. 25, 1971) (summarizing results of mail survey to all 50 states) (on file with the *Minnesota Law Review*).

23. These provisions are clearly constitutional after *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). The *Alexandria Scrap* case and the relationship between buy-in-state and buy-American laws are discussed in text accompanying notes 73-75, 96-97, 106-107 *infra*.

24. Oct. 30, 1947, 61 Stat. pt. 5, at A-11 (1947), T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter cited as the GATT].

The text of the General Agreement has been amended from time to time since 1947; the current text and a complete table of amending protocols is contained in 4 GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS. The BISD series is the GATT's public documents publication; more basic volumes are called "Volumes" while others are designated "Supplements." . . . For a comprehensive discussion of GATT legal policy, see K. DAM, *THE GATT—LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970).

Hudec, *Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment*, 59 MINN. L. REV. 461, 461 n.2 (1975).

25. U.S. DEP'T OF STATE, *THE TRADE DEBATE* 7 (1978).

26. The leading investigation of and commentary on these issues is Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249 (1967) (concluding that the GATT does supersede state law). See also Note, *United States Participation in the General Agreement on Tariffs and Trade*, 61 COLUM. L. REV. 505 (1961).

27. Executive agreements like the GATT generally have supremacy over state law, most likely derived from the supremacy clause of the Constitution, U.S. CONST. art. VI, cl. 2. See *United States v. Pink*, 315 U.S. 203, 230-31 (1942); *United States v. Belmont*, 301 U.S. 324, 331 (1937); *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 75 N.J. 272, 280-81, 381 A.2d 774, 777-78 (1977), *appeal dismissed*, 435 U.S. 982 (1978). There is no judicial authority questioning the supremacy of the GATT.

quirement) obligates signatory nations to treat products of foreign and domestic origin equally:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, distribution or use.<sup>28</sup>

Paragraph 8(a) of article III, however, creates a broad exception to this "national treatment" requirement:

The provisions of this article shall not apply to laws, regulations, or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view towards commercial resale or with a view to use in the production of goods for commercial sale.<sup>29</sup>

Reading these two provisions together, "national treatment" (or nondiscriminatory purchasing) is required in government procurements not for governmental purposes or for commercial resale. It should be noted that these provisions have not been superseded by the new Government Procurement Code, which applies only to procurements by the federal government;<sup>30</sup> further negotiations are required to establish agreements regarding state and local governments.<sup>31</sup> Nothing in the Code or the implementing legislation indicates that the above GATT requirements are rescinded.

The two courts that have tested state buy-American legislation under the GATT reached opposite holdings due to different interpretations of paragraph 8(a). In *Baldwin-Lima-Hamilton Corp. v. Superior Court*,<sup>32</sup> an American manufacturer sought a writ of mandamus to enforce a California buy-American provision.<sup>33</sup> The manufacturer had lost a bid to supply water turbines for use in the production of electricity to a competitor who intended to use foreign-produced turbines. Relying on a 1905 California case in which electricity was considered a "product" for purposes of interpreting a contract,<sup>34</sup> the *Baldwin* court held that electricity was a "good" under paragraph 8(a) of the GATT. The turbines were therefore to be used in the "production of goods for sale," making the article III excep-

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28. GATT, *supra* note 24, pt. II, art. III, para. 4.

29. *Id.* para. 8(a).

30. See note 10 *supra* and accompanying text.

31. See 19 U.S.C.A. § 2514(d) (West Supp. 1979); S. REP. NO. 249, *supra* note 7, at 136-37.

32. 208 Cal. App. 2d 803, 25 Cal. Rptr. 798 (1962).

33. *Id.* at 808, 25 Cal. Rptr. at 801-02.

34. *Id.* at 819, 25 Cal. Rptr. at 808 (citing *Terrace Water Co. v. San Antonio Light & Power Co.*, 1 Cal. App. 511, 82 P. 562 (1905)).

tion inapplicable.<sup>35</sup> Having so concluded, the court found it unnecessary to inquire whether the production of electricity is a "governmental purpose" under article III, and the court held California's statute unenforceable.<sup>36</sup>

In the New Jersey decision, *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission*,<sup>37</sup> a foreign manufacturer and New Jersey taxpayer sought an adjudication declaring New Jersey's statute void and unenforceable. The action was prompted by the Commission's request for bids for water-pumping equipment.<sup>38</sup> In upholding the buy-American requirement, the court presented several reasons for concluding that supplying water to the public is a "governmental purpose," entitling the Commission to immunity from article III under paragraph 8(a). First, the court noted that the New Jersey statute refers to the Water Supply Commission as an "instrumentality exercising public and essential governmental functions."<sup>39</sup> Second, the court discussed the "unique nature of water."<sup>40</sup> Since the days of Blackstone, according to the court, water has been considered "common property," which the state merely transmits to the public in the general interest of health, safety, and welfare, without regard to profit.<sup>41</sup> The court cited the Supreme Court's recognition of this principle in a decision upholding a state law making it illegal to transport state water to other states.<sup>42</sup> Finally, the court relied upon previous judicial characterizations of the water district as a "public body, politic and corporate,"<sup>43</sup> and as a "public trustee and public curator."<sup>44</sup> The court concluded that the procurement of water pumps fell within the GATT's paragraph 8(a) exception and consequently that the application of the buy-American requirements was valid.<sup>45</sup>

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35. 208 Cal. App. 2d at 819, 25 Cal. Rptr. at 808. See text accompanying note 29 *supra*.

36. 208 Cal. App. 2d at 823, 25 Cal. Rptr. at 809-10.

37. 75 N.J. 272, 381 A.2d 774 (1977) *appeal dismissed*, 435 U.S. 982 (1978).

38. *Id.* at 276, 381 A.2d at 776.

39. *Id.* at 284, 381 A.2d at 779 (quoting N.J. STAT. ANN. § 58:5-35 (1966)).

40. 75 N.J. at 285, 381 A.2d at 780.

41. *Id.*

42. *Id.* at 286, 381 A.2d at 781 (citing *McCarter v. Hudson Water Co.*, 209 U.S. 349, 356 (1908)).

43. 75 N.J. at 285, 381 A.2d at 780 (quoting *North Jersey Dist. Water Supply Comm'n v. City of Newark*, 103 N.J. Super. 542, 248 A.2d 249 (Super. Ct. Ch. Div.), *aff'd*, 52 N.J. 134, 244 A.2d 113 (1968)).

44. 75 N.J. at 285, 381 A.2d at 780 (quoting *City of Bayonne v. North Jersey Dist. Water Supply Comm'n*, 30 N.J. Super. 409, 105 A.2d 19 (Super. Ct. App. Div. 1954)).

45. 75 N.J. at 285, 381 A.2d at 780.

One defect in the *K.S.B.* court's application of paragraph 8(a) is immediately apparent. Despite the fact that the New Jersey statute applied to all state procurements, the court looked only to the particular procurement at issue to ascertain the statute's validity under the GATT. This limited inquiry is inconsistent with the court's approach to both the commerce clause and federal foreign affairs power issues. In those areas, the court was concerned not only with the statute's effects on the particular procurement project at issue, but also with the overall impact of the buy-American statute on foreign commerce and on federal control of foreign affairs.<sup>46</sup> The GATT issue is as much a constitutional matter as these other issues—the court acknowledged that this is in fact a supremacy clause question when it recognized that the GATT is the “supreme Law of the Land.”<sup>47</sup> There is thus no distinction between the GATT issue and the other issues which would justify the court's limited inquiry.

A more crucial problem in judicial application of article III is the lack of a standard, systematic test for interpreting and applying paragraph 8(a). First, the *K.S.B.* court did not apply paragraph 8(a) as a two-part test, as did the *Baldwin* court. Paragraph 8(a) immunizes from article III only those procurements which are both for governmental purposes *and* not with a view toward commercial resale.<sup>48</sup> The *Baldwin* court had no need to determine whether the production of electricity was a governmental function once it found that the electricity was intended for commercial resale—the absence of one of the two required factors was sufficient. The *K.S.B.* court, however, fused the two issues. It appeared to regard “governmental” and “commercial” purposes as alternatives. Consequently, having concluded that pumping water was a governmental function, the court did not proceed to question whether the water was for commercial resale and therefore beyond the scope of the paragraph 8(a) exception.

A second aspect of this problem, which can be seen in the *K.S.B.* court's treatment of paragraph 8(a), is the definition of “governmental function,”<sup>49</sup> a term crucial to circumscribing the authority for state buy-American requirements under the GATT. The *K.S.B.* court attempted to apply the term to the

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46. *See id.* at 289-302, 381 A.2d at 782-89.

47. *Id.* at 280, 381 A.2d at 778.

48. *See* text accompanying note 29 *supra*.

49. The *Baldwin* court found no need to define the term. *See* text accompanying notes 35, 36 *supra*.



facts of the case, but its interpretation and application of the term was shortsighted. The mere fact that the New Jersey statute creating the Water District Commission characterized that body as exercising a "governmental function"<sup>50</sup> does not, without more, mean that the Commission qualified for a paragraph 8(a) exception. Surely the scope of international agreements cannot depend on the labels that state legislators choose to give state instrumentalities. Nor does the court's discussion of the "unique nature of water"<sup>51</sup> as a public good supply much guidance. Although this finding was helpful in settling the issue on the particular facts of the *K.S.B.* case—the procurement of water pumps—it could not be used to justify the application of buy-American statutes to procurements unrelated to water. Finally, the *K.S.B.* court's reliance on previous judicial characterizations of the Commission's governmental functions is also unsatisfying.<sup>52</sup> These characterizations were dicta, used only to support the validity of the Commission's rates and to establish its contract rights.<sup>53</sup> Moreover, it is not relevant whether the courts of a particular state—or even of the United States—have previously characterized a function as a "governmental" one. If an international agreement is to be given consistent, equal treatment by the agreeing parties, courts must interpret its terms from a broader perspective; they must recognize that issues of interpretation have an international scope.

A broader perspective for defining the commercial/governmental distinction can be found by reference to the foreign sovereign immunity and act of state doctrines. Both American<sup>54</sup> and foreign<sup>55</sup> courts apply the distinction under these doctrines. Since publication of the "Tate letter" in 1952,<sup>56</sup>

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50. See note 39 *supra* and accompanying text.

51. See notes 40-42 *supra* and accompanying text.

52. See notes 43-44 *supra* and accompanying text.

53. See *City of Bayonne v. North Jersey Water Supply Comm'n*, 30 N.J. Super. 409, 418, 105 A.2d 19, 24 (Super. Ct. App. Div. 1954); *North Jersey Dist. Water Supply Comm'n v. City of Newark*, 103 N.J. Super. 542, 549, 248 A.2d 249, 252 (Super. Ct. Ch. Div.), *aff'd*, 52 N.J. 134, 244 A.2d 113 (1968).

54. See *Victory Transp. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1957), *cert. denied*, 381 U.S. 934 (1964); *National Am. Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622 (S.D.N.Y. 1978); *Premier S.S. Co. v. Embassy of Algeria*, 336 F. Supp. 507 (S.D.N.Y. 1971); *Ocean Transp. Co. v. Republic of Ivory Coast*, 269 F. Supp. 703 (E.D. La. 1967); *Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp.*, 25 Misc. 2d 299, 204 N.Y.S.2d 971 (1960).

55. See cases cited in *Alfred Dunhill & Co. v. Republic of Cuba*, 425 U.S. 682, 702 n.15 (1975).

56. In the "Tate letter," sent from acting State Department Legal Advisor Jack Tate to the Attorney General of the United States, Tate presented the executive branch's view that the doctrine of sovereign immunity should not be

immunity from suit in American courts has been granted to foreign sovereigns with respect to governmental or public acts, but not with respect to commercial or private acts. Thus, in the leading case of *Victory Transport v. Comisaria General*,<sup>57</sup> the United States Court of Appeals for the Second Circuit denied sovereign immunity to the Spanish government, which had damaged an American-owned ship leased to Spain to transport wheat. Since the wheat was destined for public sale in Spain, the court concluded that Spain was acting "much like any private purchaser of wheat" and that it therefore could not enjoy sovereign immunity.<sup>58</sup> Application of the sovereign immunity body of law would make acceptable the *K.S.B.* court's fusion of the two requirements in paragraph 8(a).<sup>59</sup> In other words, if a function were found to be a commercial one, like the public sale of wheat, it would not be a governmental function.

Granted, use of this body of law will not guarantee a simple application of the commercial/governmental distinction; too few cases have been decided to make a clear line apparent.<sup>60</sup> Courts and commentators have criticized the distinction as "difficult to delineate,"<sup>61</sup> as was a similar distinction that was earlier applied to domestic sovereign immunity.<sup>62</sup> Whether the distinction should or should not be drawn, however, is not at is-

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applied when foreign nations act in commercial or private capacities. 26 DEP'T STATE BULL. 984-85 (1952).

The foreign sovereign immunity doctrine is codified in the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§ 1602-1611 (1976)). The effect the Act will have on application of the distinction is unclear, as is the necessity of applying the distinction under the Act. Therefore, the body of law suggested here for reference in interpreting paragraph 8(a) is contained in the pre-Act foreign sovereign immunity decisions, and decisions under the act of state doctrine which is unaffected by the Act.

57. 336 F.2d 354 (2d Cir. 1957), *cert. denied*, 381 U.S. 934 (1964).

58. *Id.* at 361.

59. See notes 29, 48 *supra* and accompanying text.

60. See Annot., 25 A.L.R.3d 322, 338 (1969).

61. *Alfred Dunhill & Co. v. Cuba*, 425 U.S. 683, 715 (1975) (Powell, J., concurring); see *Delaume, Public Debt & Sovereign Immunity: The Foreign Sovereign Immunities Act of 1976*, 71 AM. J. INT'L L. 399, 405 (1977); *Lowenfeld, Claims Against Foreign States—A Proposal for Reform of U.S. Law*, 44 N.Y.U. L. REV. 901, 918 (1969).

62. See *Washington Township v. Ridgewood Village*, 26 N.J. 578, 584, 141 A.2d 308, 311 (1958). The *K.S.B.* court cited the *Washington Township* case in its refusal to apply the proprietary/governmental distinction previously used in domestic sovereign immunity decisions. 75 N.J. at 287, 381 A.2d at 782. The fact that this distinction caused problems under the domestic doctrine should not, however, prevent the use of the distinction to help interpret the GATT. The reasons for referring to the foreign sovereign immunity doctrine when interpreting paragraph 8(a), see text accompanying notes 64-66 *infra*, are not applicable to the issue of domestic sovereign immunity.

sue—the GATT clearly demands its use.<sup>63</sup> Given that necessity, use of foreign sovereign immunity law to help define that distinction is desirable for several reasons. First, the distinction would be given more consistent meaning in this country because each state court would not rely on state law. Second, there would be more assurance that foreign nations ultimately affected by decisions of American courts would recognize the means by which the distinction is being interpreted since most foreign courts also apply the commercial/governmental distinction in their own doctrines of sovereign immunity.<sup>64</sup> Finally, the Supreme Court is apparently satisfied with the foreign sovereign immunity doctrine's approach to the commercial/governmental distinction since the Court recently extended that approach to yet another area of the law. With approving citations to the "Tate letter," *Victory Transport*, and the sovereign immunity decisions that followed, the Court in *Albert Dunhill & Co. v. Republic of Cuba*<sup>65</sup> held that the act of state doctrine, like the foreign sovereign immunity doctrine, will not apply when a foreign nation acts in a commercial or private capacity.<sup>66</sup> Thus, a body of law that is well recognized in the United States and in the international community could be used to interpret article III, encouraging consistent interpretation of the commercial/governmental distinction by all member nations of the GATT.

If paragraph 8(a) is interpreted by reference to the doctrine of foreign sovereign immunity, "governmental purpose" would probably be narrowly defined, thus limiting the permissible scope of buy-American measures. The *Victory Transport* decision limited sovereign immunity to "strictly political or public acts about which sovereigns have traditionally been quite sensitive."<sup>67</sup> State functions such as providing electricity or natural gas to the public do not seem to fall within the limits of this test. Moreover, it does not appear that any of the buy-American statutes currently in effect were drafted with any

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63. See text accompanying note 29 *supra*.

64. See, e.g., cases cited in *Alfred Dunhill & Co. v. Republic of Cuba*, 425 U.S. 682, 702 n.15 (1975).

65. 425 U.S. 682 (1975).

66. *Id.* at 703.

67. 336 F.2d at 360. One court went so far as to hold that the transportation of grain for troops was not a governmental function under the doctrine. *Et Ve Balik Kurumu v. B.N.S. Int'l Sales Corp.*, 25 Misc. 2d 299, 204 N.Y.S.2d 971 (1960). But cf. *Oliver Am. Trading Co. v. Mexico*, 5 F.2d 659, 665 (2d Cir. 1924), *cert. denied*, 267 U.S. 596 (1925) (the operation of a national railroad is a "governmental function").

deference to the article III restrictions; no effort to exclude state functions that are arguably not "governmental" is discernible in those statutes. Thus, even under a broader test than that applied in *Victory Transport*, most buy-American statutes are probably overinclusive under article III of the GATT.

In summary, paragraph 8(a), which exempts some governmental procurements from the general provisions of the GATT, has not yet been satisfactorily interpreted or applied. The preferable interpretation would give a narrow meaning to the paragraph, leaving little latitude for the operation of state buy-Americanism.

### III. THE COMMERCE CLAUSE

The commerce clause of the Constitution<sup>68</sup> provides a clearer basis for challenging state buy-American laws than does the GATT. The power to "regulate Commerce with foreign Nations, and among the several States,"<sup>69</sup> though framed as an affirmative grant to the federal government, implies a limitation on the states' power to regulate commerce. The Supreme Court has relied on this "negative implication" to invalidate state regulatory schemes that unduly interfere with the free flow of interstate commerce,<sup>70</sup> or that impair the ability of non-residents to freely compete in the markets of the regulating state.<sup>71</sup> A general principle emerges from these decisions: the state regulation is valid under the commerce clause if that regulation rationally serves a valid state interest and that interest outweighs the regulatory burden or discrimination against interstate commerce.<sup>72</sup>

This general principle was not applied, however, in a recent challenge to state interference in a state-created market. In *Hughes v. Alexandria Scrap Corp.*,<sup>73</sup> the state of Maryland had instituted a program to encourage the elimination of abandoned automobiles on Maryland roads by paying bounties to processors who destroyed such vehicles. The state, however, made it difficult for out-of-state processors to participate in the

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68. U.S. CONST. art. I, § 8, cl. 3.

69. *Id.*

70. *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 521-30 (1959); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 763-84 (1945).

71. *H. P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 530-41 (1949); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521-28 (1935).

72. *City Serv. Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 186-87 (1950); see *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 770-71 (1945). See generally L. TRIBE, *supra* note 8, § 6-5, at 326.

73. 426 U.S. 794 (1976).

program.<sup>74</sup> In essence, Maryland created a market but limited access to that market to its own citizens. The Supreme Court rejected an argument by a Virginia processor that Maryland's scheme violated the commerce clause:

[U]ntil today the Court has not been asked to hold that the entry by the State itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State. . . . Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.<sup>75</sup>

*Alexandria Scrap* thus solidly established that states may, as a valid exercise of their police power, favor their own citizens in markets which owe their existence to the state itself.

This background of commerce clause principles must be tempered by an understanding that state interference with foreign commerce is subject to greater restriction than is interference with interstate commerce. Despite the fact that the Constitution grants the interstate and foreign commerce powers to the federal government in the same clause and in the same terms, and despite some very early authority that the two federal powers imply equal limitations on the power of the states,<sup>76</sup> modern decisions clearly articulate that states are left with less power to affect foreign commerce than interstate commerce.<sup>77</sup> This distinction was recently emphasized in *Japan*

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74. *Id.* at 796-99.

75. *Id.* at 808, 810. The issue presented in *Alexandria Scrap* was perhaps not as new to the Court as the quoted segment indicates. The Court had earlier summarily affirmed a case that involved a similar issue. See *American Yearbook Co. v. Askew*, 409 U.S. 904 (aff'g mem. 339 F. Supp. 719 (M.D. Fla. 1972)). In *American Yearbook*, a three-judge District Court upheld a Florida statute requiring that all state printing be done within the state of Florida. Summary affirmances are binding precedent, as pointed out in the *K.S.B.* opinion. 75 N.J. at 297, 381 A.2d at 786 (citing *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975)). Numerous state court decisions have also upheld similar buy-in-state schemes. See cases cited in *American Yearbook Co. v. Askew*, 339 F. Supp. 719, 724 nn.29 & 30 (1972).

76. "The power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it." *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504, 578 (1847). See *Pittsburg & S. Coal Co. v. Bates*, 156 U.S. 577, 587 (1895). But see *Buttfield v. Stranahan*, 192 U.S. 470, 492-93 (1904); *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875).

77. See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445-49 (1979). "The premise of appellees' argument is that the Commerce Clause analysis is identical, regardless of whether interstate or foreign commerce is involved. This premise, we have concluded, must be rejected. . . . [A] more extensive constitutional inquiry is required." *Id.* at 446. See also *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 34-40 (1948); *Board of Trustees of the Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933). The Court in *Japan Line*

*Line, Ltd. v. County of Los Angeles*.<sup>78</sup> The Supreme Court held that a California property tax could not be levied on cargo containers owned by Japanese shipping companies that were temporarily in California ports.<sup>79</sup> The Court refused to rely on earlier decisions that dealt with state taxation of the instrumentalities of interstate commerce.<sup>80</sup> Instead, it held that two additional inquiries must be made when foreign commerce is affected: "first, whether the tax . . . creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" <sup>81</sup> In finding that application of the California tax did not survive this second inquiry,<sup>82</sup> the Court recognized both the risk of retaliation by Japan and the lack of uniformity in taxation of foreign commerce that would result if individual states could impose such taxes. The Court also indicated that, contrary to situations involving interstate commerce, interests of the state have little relevance when foreign commerce is affected.<sup>83</sup> Although the Court weighs burdens on interstate commerce against valid state interests,<sup>84</sup> such state interests cannot excuse burdens on foreign commerce.<sup>85</sup>

Although not heavily relied upon in *Japan Lines*, the im-

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cited evidence that the framers of the Constitution intended less leeway for states to affect foreign commerce than interstate commerce. 441 U.S. at 448 n.12. See also Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 475 (1941), quoted in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. at 448 n.12 ("there is no tenable reason for believing that anywhere nearly so large a range of action was given [to the federal government] over commerce 'among the several states' as over that 'with foreign nations'").

78. 441 U.S. 434 (1979).

79. *Id.* at 453-54.

80. *Id.* at 445-51. See note 77 *supra*.

81. 441 U.S. at 452.

82. "If other States follow California's example . . . foreign-owned containers will be subjected to various degrees of multiple taxation, depending on which American ports they enter. This result, obviously, would make 'speaking with one voice' impossible." *Id.* at 453.

83. See *id.* at 455-56.

84. See note 72 *supra* and accompanying text.

85. The Court rather brusquely rejected the state of California's argument that it has a legitimate interest in maintaining a fair and effective tax system and that such interest should support the state's right to tax the shipping containers: "These arguments are not without weight, and [California] may indeed be disadvantaged by our decision today. These arguments, however, are directed to the wrong forum. . . . The problems . . . admit only of a federal remedy. They do not admit of a unilateral solution by the State." 441 U.S. at 457. See also *United States v. Pink*, 315 U.S. 203, 233 (1942); *DiSanto v. Pennsylvania*, 273 U.S. 34, 37 (1927); *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 202 (1925).

port-export clause of the Constitution also supports the conclusion that the federal government's foreign commerce power is broader than its power to regulate interstate commerce. The Supreme Court has explicitly held that this clause, which prohibits states from levying "Imposts or Duties on Imports or Exports,"<sup>86</sup> bolsters the federal foreign commerce power.<sup>87</sup> Although most of the interpretational history of the clause is devoted to the issue of when an item ceases to be an "import" within the meaning of the clause,<sup>88</sup> the Court recently ignored this issue. In *Michelin Tire Corp. v. Wages*,<sup>89</sup> the Court disregarded the fact that the goods in question had lost their character as imports,<sup>90</sup> and chose, instead, to consider whether invalidating the state tax at issue would serve the purposes of the clause.<sup>91</sup> Among those purposes, according to the Court, was the assurance that the federal government "'speak with one voice' when regulating commercial relations with foreign governments . . . which might affect foreign relations."<sup>92</sup> The Court stated that this goal is undermined by any tax that discriminates against foreign products.<sup>93</sup> The import-export clause is therefore particularly important here, because it provides additional, independent evidence of a constitutional scheme to ensure that the United States presents a single coherent trade policy.

In *K.S.B.*,<sup>94</sup> the only major buy-American law decision to address the issue,<sup>95</sup> the court rejected a commerce clause attack on the New Jersey statute. The court first acknowledged

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86. U.S. CONST., art. I, § 10, cl. 2.

87. *Board of Trustees of the Univ. of Ill. v. United States*, 289 U.S. 48, 57 (1933). See generally J. NOWAK, HANDBOOK ON CONSTITUTIONAL LAW 130-31 (1978).

88. See *Youngstown Sheet & Tube Co. v. Bowers*, 358 U.S. 534 (1959); *Gulf Fisheries Co. v. MacInerney*, 276 U.S. 124 (1928); *Low v. Austin*, 80 U.S. 29 (1872); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 436-45 (1827).

89. 423 U.S. 276 (1976).

90. *Id.* at 302 (White, J., concurring).

91. *Id.* at 283-94.

92. *Id.* at 285.

93. *Id.* at 285-86.

94. *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 75 N.J. 272, 381 A.2d 774 (1977) *appeal dismissed*, 435 U.S. 982 (1978).

95. *Id.* at 298-302; 381 A.2d at 787-89. Two other decisions need not be discussed in detail. The commerce clause was discussed briefly in a concurring opinion in *Bethlehem Steel Corp. v. Board of Comm'rs*, 276 Cal. App. 2d 221, 230-32, 80 Cal. Rptr. 800, 806-07 (1969) (Reppy, J., concurring); that opinion, however, antedated the *Alexandria Scrap* and *Japan Line* decisions, and is therefore of little importance now. A New York court also rejected a commerce clause attack on its state's buy-American law, but its analysis does not justify extensive comment. See note 11 *supra*.

the traditional commerce clause principles limiting state power and recognized that *Alexandria Scrap* was the most critical decision because it dealt with preferences given in state-created markets.<sup>96</sup> The court discussed the relevance of *Alexandria Scrap*:

An objection to the application of [*Alexandria Scrap*] to the facts of this case might be advanced on the theory that a state's decision to favor American as opposed to in-state producers does not reflect a legitimate "local" purpose. In this manner, a Buy New Jersey scheme would be exempt from Commerce Clause restrictions, but a Buy American scheme would not. We cannot accept this incongruous result. . . . It would be odd indeed to find that when a state becomes less parochial and chooses in its own purchases to prefer the products of the nation, as opposed to those of the state, its purpose becomes suspect under the Commerce Clause.<sup>97</sup>

Having concluded that *Alexandria Scrap* controlled, the court went on to reject the argument that the impact on foreign commerce called for closer constitutional scrutiny. Relying on early Supreme Court authority, the court found "no need in this factual context to differentiate" between foreign and interstate commerce.<sup>98</sup>

This final conclusion by the *K.S.B.* court—that there is no need to differentiate between foreign commerce and interstate commerce—cannot be supported after the Supreme Court's decision in *Japan Line* explicitly rejected that notion.<sup>99</sup> Although *Japan Line* involved a state tax and therefore a different type of interference with foreign commerce than that presented by buy-American legislation, the Court's rationale is broad enough to apply to all foreign commerce issues. The Court stressed its concern for avoiding foreign retaliation against American commerce and for establishing uniform state treatment of foreign commerce.<sup>100</sup> It is clear that buy-American laws also invite foreign retaliation and lead to a lack of uniformity in state treatment of foreign commerce.<sup>101</sup> The federal government actively opposes state buy-American laws for just these reasons.<sup>102</sup>

The failure of the *K.S.B.* court to mention the import-export clause is particularly troubling. Because that clause bol-

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96. 75 N.J. at 294-96, 381 A.2d at 785-86.

97. *Id.* at 298, 381 A.2d at 787.

98. *Id.* at 300, 381 A.2d at 788.

99. See note 77 *supra*.

100. See notes 81-82 *supra* and accompanying text.

101. Some states have buy-American policies, others do not; some have absolute provisions, others limited provisions; some apply to all procurements, others to only certain products. See notes 17-21 *supra* and accompanying text. Moreover, the federal government actively opposes state buy-Americanism. See notes 146-150 *infra* and accompanying text.

102. See notes 146-150 *infra*.



sters the federal commerce power and demands that a single voice express the nation's foreign trade policy,<sup>103</sup> it is essential to an analysis of buy-American legislation. In fact, the trial court in *Bethlehem Steel Corp. v. Board of Commissioners*<sup>104</sup> stated in dictum that the import-export clause alone would have invalidated California's buy-American act, reasoning that since a state may not tax foreign goods without congressional consent, it may not impose an effective embargo of those goods.<sup>105</sup>

As suggested above, the *K.S.B.* court's virtually exclusive reliance on *Alexandria Scrap* to dispose of the commerce clause attack was misplaced, because foreign commerce was at issue. But even if it were decided that the stricter foreign commerce principles do not apply to state-created markets, and that state interests can be invoked to excuse interferences with foreign commerce, buy-American statutes would still be susceptible to invalidation under the commerce clause because no legitimate state interest is served by buy-American statutes. Both the purpose and effect of buy-American laws is the protection of *all* American business. Any individual state, however, has police power over only its citizens. In preferring American products, a state acts for the sake of those over whom it has no responsibility, risking foreign retaliation that "of necessity would be felt by the Nation as a whole."<sup>106</sup> Because neither the parties benefited by the preference nor the parties burdened by them are fully represented in the enacting state's legislature, the state is balancing risks against benefits for people and interests beyond its borders. Thus, one of the precepts of the *Alexandria Scrap* analysis—that the state be serving its legitimate interest—is not present.<sup>107</sup>

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103. See notes 86-93 *supra* and accompanying text.

104. No. 899165 (Super. Ct. Los Angeles County Dec. 22, 1966).

105. See Comment, *Constitutional Law—Foreign Relations Power—California Buy American Act Held Unconstitutional on its Face as an Infringement of Federal Government's Exclusive Power to Conduct Foreign Affairs*, 3 N.Y.U. J. INT'L L. & POL. 164, 173 n.58 (1970).

106. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 453 (1979) (referring to the risk of trade retaliation by Japan if the California property tax were applied to Japanese shipping containers).

107. As pointed out by the *K.S.B.* court, this line of reasoning would suggest that a "buy-New Jersey" scheme would be valid, but a "buy-American" scheme would not. The court could not accept this "incongruous result." See text accompanying note 97 *supra*. This result is perhaps less paradoxical than it first appears, because the impact on foreign commerce caused by a "buy-in-state" law is likely to be far less than that caused by a typical buy-American law. Since no state has a broad enough industrial base to discriminate wholesale against goods from other states, typical "buy-in-state" preferences relate to a

Despite the various considerations pointing towards invalidity of buy-American statutes, support for them could be mustered by taking an entirely different approach to the issue. It could be argued that *Alexandria Scrap* and its companion case, *National League of Cities v. Usery*,<sup>108</sup> have carved out an area of state power affirmatively limiting the federal commerce power.<sup>109</sup> In *National League of Cities*, the Supreme Court held that the commerce clause does not grant the federal government power to require the states to pay a minimum wage to their employees.<sup>110</sup> Justice Rehnquist, writing for the Court, cited tenth amendment cases to establish that the Court "has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce."<sup>111</sup> The issue, according to Rehnquist, was "whether [setting salary and hour schedules] are 'functions essential to separate and independent existence.'"<sup>112</sup> Relying on figures showing the significant costs of complying with the minimum wage law, he found that setting salary and hour schedules was an essential state function.<sup>113</sup> Although this line of reasoning does not surface in the rather sketchy *Alexandria Scrap* opinion, it may well underlie the Court's holding that state-created markets are immune from traditional interstate commerce principles.<sup>114</sup> Thus, *Alexandria Scrap* may stand for the proposition that states may do as they wish with state-created markets.

If this broad reading is accepted, it is uncertain whether buy-American statutes could pass the test applied in *National*

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very limited range of products or services. The scheme upheld in *Alexandria Scrap*, for example, related only to processing of junk automobiles. See notes 73-74 *supra* and accompanying text. Similarly, a Florida law required merely that all the state's printing needs be satisfied within the state. See *American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972). Buy-American laws, on the other hand, often cover *all* state procurements or relate to more expensive and important products such as steel. See notes 17-21 *supra* and accompanying text. There is thus a difference between "buy-in-state" and buy-American schemes in the quantum of effect they have on foreign commerce, which justifies treating them differently under constitutional foreign commerce principles.

108. 426 U.S. 833 (1976) (decided the same day as *Alexandria Scrap*).

109. The *K.S.B.* court viewed *National League of Cities* as being inapplicable, apparently because the issue of "[w]hether Congress has the authority to prohibit [buy-American statutes]" was not present. 75 N.J. at 295 n.9, 381 A.2d at 785 n.9.

110. 426 U.S. at 852.

111. *Id.* at 842.

112. *Id.* at 845.

113. *Id.* at 846-52.

114. See 426 U.S. at 809-10; note 75 *supra* and accompanying text.

*League of Cities*.<sup>115</sup> Putting that test in context, the issue would be whether favoring American products is essential to the separate and independent existence of the state. Although it seems obvious that such favoritism is not essential, one must wonder whether the Court would faithfully apply that test. It is difficult to see how paying less than the federal minimum wage to state employees is essential to a separate and independent existence, yet that is what the Court found.<sup>116</sup> *National League of Cities* and *Alexandria Scrap* may thus portend the creation of an area of state sovereignty within which buy-American statutes stand secure. This conclusion, however, can only be characterized as a speculative and broad interpretation of those cases. Furthermore, controlling the state payroll serves an interest far more directly important to the state than do buy-American laws. *Alexandria Scrap* and *National League of Cities* therefore probably do not immunize state-created markets from attack under the foreign commerce power.

In summary, the restrictions on state power that Supreme Court decisions impose on foreign commerce probably apply fully to state-created markets. Those restrictions are severe and leave no room for state imposition of buy-American preferences.

#### IV. THE FOREIGN AFFAIRS POWER

Perhaps the strongest argument for invalidating the buy-American laws is that they interfere with the federal government's foreign affairs power. Although the Constitution contains no explicit grant of power to the federal government to conduct foreign affairs, the Supreme Court has long recognized that such power is implicit in the Constitution's concept of national sovereignty.<sup>117</sup> In interpreting the foreign affairs power during the past century, the Supreme Court has often emphasized the federal government's exclusive control over that power,<sup>118</sup> prompting one commentator to conclude, "whatever

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115. See text accompanying note 112 *supra*.

116. See text accompanying note 113 *supra*.

117. *Cohen v. Virginia*, 19 U.S. (6 Wheat.) 264, 413 (1821) ("That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people."). See also *Knox v. Lee*, 79 U.S. (12 Wall.) 457, 555 (1870) (Bradley, J., concurring) ("[The federal government] is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the State governments.").

118. *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("The Federal Government,

the division of foreign policy responsibility *within* the national government, *all* such responsibility is reposed at the national level rather than dispersed among the states and localities."<sup>119</sup>

Although the Court's sweeping language<sup>120</sup> suggests that state legislation touching upon foreign affairs is absolutely banned, actual holdings of the Court suggest otherwise. *Clark v. Allen*<sup>121</sup> and *Zschernig v. Miller*<sup>122</sup> have established that state legislation which produces "incidental or indirect effects" on foreign relations is not invalid as an encroachment on the federal foreign affairs power.<sup>123</sup> The rationale for this allowance to the states is clear and sensible: the exercise of most, if not all, state powers produces some remote effect on foreign affairs.<sup>124</sup> Burning oil to heat the state capitol, for example, has an impact upon trade accounts with oil-exporting nations. If the states are to be allowed to exercise any traditional powers, these remote effects on foreign affairs must be disregarded. The "incidental and indirect" test developed by the Court makes such remote effects permissible while still protecting the federal government's power to conduct foreign affairs authoritatively. *Allen* and *Zschernig* suggest that state-produced effects on foreign affairs are permissible only if they stem from the exercise of a valid state power; otherwise, the effect on foreign affairs would not be "incidental" to legitimate state action. Thus, in upholding a probate statute producing minimal effects on foreign relations, the *Allen* Court thought it important that

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representing as it does the collective interest of the forty-eight states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties."). *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1888) ("The Chinese Exclusion Case") ("for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power"); *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893) ("The United States [is] vested with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective."); *United States v. Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States; it is vested in the national government exclusively.").

119. L. TRIBE, *supra* note 8, § 4-5, at 172 (emphasis in original).

120. See note 118 *supra*.

121. 331 U.S. 503 (1946) (upholding a California probate statute making the right of foreigners to inherit the property of Californians contingent upon the granting of similar rights in the foreigner's home nation).

122. 389 U.S. 429 (1968).

123. 389 U.S. at 433; 331 U.S. at 517. In *Zschernig*, the Supreme Court invalidated an Oregon statute virtually identical to the statute upheld in *Allen*, see note 121 *supra*. Both opinions were written by Justice Douglas, who expressly retained *Allen*'s "incidental and indirect" standard in *Zschernig*. According to Douglas, changing factual circumstances since the *Allen* decision called for a different result in *Zschernig*, twenty-two years later. *Id.* at 433.

124. 331 U.S. at 517.

probate is traditionally a matter of state law.<sup>125</sup>

The state courts that tested buy-American legislation under the foreign affairs power reached opposite conclusions. In striking down the California statute in *Bethlehem Steel Corp. v. Board of Commissioners*<sup>126</sup>, a California state court of appeals relied heavily on the United States Supreme Court's references to the exclusivity of the federal foreign affairs power.<sup>127</sup> Noting that the California buy-American statute could be perceived as a product of "selfish provincialism" that would invite foreign retaliation, the court quickly concluded that the statute produced more than "incidental or indirect" effects.<sup>128</sup> The court made particular reference to then-current trade negotiations that demanded the maintenance of goodwill with United States' trading partners.<sup>129</sup> According to the court, the mere potential for an adverse effect on those negotiations was sufficient to invalidate the statute.<sup>130</sup>

In upholding the New Jersey buy-American statute, however, the *K.S.B.* court distinguished *Bethlehem Steel* by pointing out that New Jersey's statute was more limited in scope than California's.<sup>131</sup> Furthermore, the court stated that the New Jersey statute did not represent the "kind of intrusion" into the foreign affairs power proscribed in *Zschemnig*.<sup>132</sup> According to the court, *Zschemnig* prohibits judicial inquiry into sensitive ideological issues,<sup>133</sup> an inquiry not required by the New Jersey statute.<sup>134</sup> Finally, the court relied on paragraph 8(a) of the GATT (which it interpreted as excluding state procurements from the GATT coverage)<sup>135</sup> and the federal Buy-American Act to establish that the statute did not contradict current federal policy.<sup>136</sup>

Analysis of the *K.S.B.* court's reasoning reveals several

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125. *Id.*

126. *Bethlehem Steel Corp. v. Board of Comm'rs*, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969).

127. *Id.* at 224-29, 80 Cal. Rptr. at 801-05. See note 118 *infra*.

128. *Id.* at 228, 80 Cal. Rptr. at 805.

129. *Id.* at 228 n.11, 80 Cal. Rptr. at 804 n.11.

130. *Id.* at 228, 80 Cal. Rptr. at 805 (citing *Zschemnig v. Miller*, 389 U.S. 429, 441 (1968)).

131. 75 N.J. at 293, 381 A.2d at 784.

132. *Id.* at 292, 381 A.2d at 784.

133. *Id.* at 291-92, 381 A.2d at 783.

134. *Id.* at 292, 381 A.2d at 783. The statute, according to the court, did not authorize "local units of government to engage in the sensitive business of evaluating the politics of countries whose citizens seek to market their products in this State." *Id.*

135. See notes 37-44 *supra* and accompanying text.

136. 75 N.J. at 283, 381 A.2d at 784.

major flaws, thus making *Bethlehem Steel* the better authority on the effect of buy-American legislation on the foreign affairs power. The first flaw stems from the limited reading of *Zschernig* by the *K.S.B.* court. The court offered no support for reading *Zschernig* as proscribing only state law that produces one type of effect on foreign affairs. Although it is true that the *Zschernig* opinion emphasizes the particular evil caused by the Oregon statute at issue, the Supreme Court expressly retained the *Clark v. Allen* "indirect and incidental" standard under which the Court looked not to the kind of effect, but only to the nature and importance of that effect.<sup>137</sup> Thus, if a buy-American statute produces an effect on foreign relations that is other than "indirect or incidental," that statute should not be saved merely because the effect happens to be of a different type than that proscribed in *Zschernig*.

Second, the difference in the scope of the California and New Jersey statutes does not justify holding one invalid but not the other. Regardless of the intended scope of any of the statutes in question, the least that can be said is that the scope of each is broad enough to provide favoritism to American producers. If the statute is broad enough to accomplish that purpose, it is broad enough to affect international trade. Moreover, the Supreme Court has not emphasized the degree to which foreign relations are affected. Judging from its rationale,<sup>138</sup> the "indirect or incidental" test appears to be more concerned with the connection between the effect on foreign affairs and the exercise of a valid state power.

Third, the court should have questioned whether buy-American measures serve any traditional state interest. This is the same issue that was raised in the earlier discussion of the commerce clause: Buy-American measures serve an overly broad interest; they grant favoritism to all American producers with attendant consequences for American producers as a whole.<sup>139</sup> The effects on foreign relations produced by buy-American statutes are therefore not incidental to a traditional state power. Thus the *Clark v. Allen* rationale of excusing remote side-effects stemming from traditional state functions does not apply.<sup>140</sup>

Fourth, the compatibility of buy-American laws with fed-

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137. See note 123 *supra* and accompanying text.

138. See notes 124-125 *supra* and accompanying text.

139. See notes 106-107 *supra* and accompanying text.

140. See notes 121-125 *supra* and accompanying text.

eral policy must be challenged. Instead of looking for an actual, present conflict with federal policy, the *K.S.B.* court should have tested for a potential conflict, as did the *Bethlehem Steel* court.<sup>141</sup> In *Zschernig*, the Supreme Court required only a potential for conflict to invalidate the Oregon statute.<sup>142</sup> More importantly, even if current federal policy is considered determinative, a conflict with that policy is apparent upon faithful application of Supreme Court precedent. Although the *K.S.B.* court looked to the scope of the GATT and to a federal statute (the federal Buy-American Act) to determine what the federal policy was,<sup>143</sup> the Supreme Court generally regards the views of the State Department as definitive of current United States foreign policy.<sup>144</sup> In *Zschernig*, for example, both the concurring and dissenting opinions referred to the State Department's views of the Oregon statute; no reference was made to conformity to federal statutes.<sup>145</sup> Had the New Jersey court examined State Department policy, it would have discovered a long-standing and active opposition to state buy-American laws. Since at least 1958, the Department has monitored pending buy-American bills and attempted to persuade legislators and governors that passage of the bills would not be in the national interest.<sup>146</sup> The experience of the Department has also indicated that these state laws are a significant issue in foreign policy; the Department regularly receives objections from foreign embassies when states consider enacting buy-American

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141. See note 130 *supra* and accompanying text.

142. Writing for the Court, Justice Douglas invalidated the statute in question even though the federal government in its amicus brief did not contend that the statute "unduly interfere[d] with the United States' conduct of foreign relations." 389 U.S. at 434 (quoting Brief for the United States as Amicus Curiae at 6 n.5, *Zschernig v. Miller*, 389 U.S. 429 (1968)). Justices Stewart and Brennan, concurring, expressly employed a potential conflict test: "Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may." 389 U.S. at 443 (Stewart, J., concurring). Justice Harlan, who relied on the State Department's nonopposition to Oregon's statute in his concurring opinion, was apparently the only Justice to disagree. See 389 U.S. at 460.

143. See 75 N.J. at 283-85, 381 A.2d 780-84.

144. See, e.g., *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 321 (1936). See generally Boulder, *The Office of the Legal Advisor: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 673 (1962); Franck, *The Courts, The State Department and National Policy: A Criterion for Judicial Abdication*, 44 MINN. L. REV. 1101 (1960).

145. See note 142 *supra*. See also *Clark v. Allen*, 331 U.S. 503, 517 (1947).

146. Interview with Joel S. Spiro, Chief, Division of Special Trade Activities and Commercial Treaties, Department of State, in Washington, D.C. (Oct. 23, 1979) [hereinafter cited as Spiro Interview].

provisions.<sup>147</sup> The adoption of the Government Procurement Code does not alter this assessment of the Department's policy on state buy-American laws. As discussed above, the Code does not cover state and local procurements;<sup>148</sup> it merely obligates the federal government to inform state and local authorities of the benefits of trade liberalization.<sup>149</sup> The Department of State, however, will continue to oppose actively the adoption of state and local buy-American policies.<sup>150</sup>

Finally, whether the foreign affairs power *should* be read to allow states to legislate in this area must be questioned. Buy-American laws are a response to complex economic problems such as the need to protect American producers against unfair foreign competition.<sup>151</sup> Although it is understandable that state legislators seek solutions to these problems, they lack the information, expertise, experience, and resources necessary to deal properly with the problems. Only the federal government is in a position to accurately weigh factors as delicate and wide-ranging in impact as the effects buy-American legislation have on foreign relations or on international trade negotiations. Superior federal competence thus suggests that courts strictly limit state authority in the area of trade policy.<sup>152</sup>

In summary, Supreme Court guidelines outlining allowable state-produced effects on foreign relations show that state buy-American laws impermissibly interfere with the federal foreign affairs power. The laws significantly conflict with current federal policy and are not incidental to the exercise of a traditional state function.

## V. CONCLUSION

A growing number of states have enacted measures favoring American producers over foreign competitors in the state and local procurement market. The *K.S.B.* decision and the absence of any restrictions on state and local buy-Americanism in the new Government Procurement Code have provided an aura of validity to these measures. An examination of the relevant

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147. *Id.*

148. See notes 10, 30-31 *supra* and accompanying text.

149. See GOVERNMENT PROCUREMENT CODE, *supra* note 6, pt. I, para. 2.

150. Spiro Interview, *supra* note 146.

151. See note 1 *supra* and accompanying text.

152. Cf. Morrison, *Limitations on Alien Investment in American Real Estate*, 60 MINN. L. REV. 621, 650 (1976) (state prohibitions on alien land investments) ("Since state legislatures are fundamentally not well informed on international trade, on monetary and economic matters, or on the implications of their decisions for American policy, they should not act in this field.").



constitutional provisions and federal law and policies, however, discloses three independent grounds for invalidating state buy-American preferences.

First, the General Agreement on Tariffs and Trade (GATT) requires equal treatment for foreign products in many procurements to which buy-American provisions now apply. Procurements which are both "for governmental purposes" and "not with a view towards commercial resale" are exempted from the GATT. Existing buy-American laws, however, are not limited to such exempted procurements. The exemption is best interpreted by reference to the act of state and foreign sovereign immunity doctrines which would give a narrow meaning to the exemption. Under such an interpretation, or even under a broader one, buy-American laws are invalid under the GATT.

Second, state buy-American laws are invalid under the commerce clause. The power of states to affect foreign commerce is far more strictly limited than is their power to affect interstate commerce—essentially no state regulation is permitted. Buy-American policies, however, are clearly intended to affect foreign commerce by limiting imports and controlling unfair foreign competition. The commerce clause, as well as the import-export clause, constitutionally mandates that the nation "speak with one voice" in foreign trade. Buy-Americanism, if implemented at the state level, makes impossible such singularity of policy. Moreover, the interests served by buy-American policies, as well as the attendant risks, are national in scope and therefore beyond the police power of the individual state enacting the policy.

Third, buy-American laws interfere with the power to conduct foreign affairs, a power that is wholly vested in the federal government. Although "incidental or indirect" effects on foreign relations are tolerable, state buy-American laws significantly conflict with current United States foreign policy. Moreover, the effect that they have on foreign affairs is not incidental to a traditional state function, since the laws seek to favor interests beyond the state's borders. Finally, because the federal government is better equipped than the states to deal with matters of foreign policy, state interference with federal policy should be strictly limited.